BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JILL STEGER	)	
Claimant	)	
	)	
VS.	)	
	)	
APPLEBEES	)	
Respondent	)	Docket No. 1,003,360
	)	
AND	)	
	)	
INSURANCE CO. OF THE WEST	)	
CONTINENTAL WESTERN INS. CO.	)	
Insurance Carriers	)	

ORDER

Claimant requests review of a preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on June 26, 2002.

ISSUES

The Administrative Law Judge determined claimant failed to meet her burden of proof that her accidental injury on March 9, 2002, either arose out of and in the course of her employment or was a direct and natural consequence of her previous work-related knee injuries. Therefore, the Administrative Law Judge denied claimant's request for temporary total disability compensation and medical treatment.

Claimant argues the fracture of her hip in a fall at a tanning salon on March 9, 2002, was the direct and natural consequence of her previous work-related knee injuries suffered while in the course of her employment with respondent.

Respondent and its insurance carrier, Insurance Company of the West, argue the the appeal does not raise a jurisdictional issue for appeal from a preliminary hearing. In the alternative, the Insurance Company of the West argues claimant had been treated and released without restrictions after the injury she suffered on October 2001, during this carrier's coverage. It should be noted that Insurance Company of the West's workers compensation coverage for the respondent ended on November 1, 2001.

Respondent and its insurance carrier, Continental Western Insurance, argue the evidence establishes claimant's fall at the tanning salon on March 9, 2002, was not a natural and probable consequence of her previous work-related knee injuries but instead was caused by claimant either tripping or by weakness related to her osteoporosis secondary to her anorexia.

The issues before the Board on review are:

1. Does the Board have jurisdiction to review the June 26, 2002, preliminary hearing Order?

2. If so, was claimant's fall and hip injury a natural and probable consequence of her work-related knee injuries or a new intervening accidental injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

In September or October 2001, claimant was injured while working for respondent when some shelving fell on her. Claimant received medical treatment for her right knee, was released without restrictions and returned to her regular job duties.

In November 2001, while at work, claimant slipped in some water, fell and landed on her right knee. Claimant again received medical treatment for her right knee, was released without restrictions and returned to her regular job duties.

On December 21, 2001, claimant suffered the third injury to her right knee. She tripped over a buckled floor mat, fell and landed on her right knee. She experienced pain and swelling and sought emergency room treatment on December 23, 2001. Claimant was diagnosed with a minimally displaced patellar fracture. She was placed in a knee immobilizer and provided pain medication.

Claimant was provided further treatment with Dr. Daniel J. Prohaska. Dr. Prohaska saw claimant on December 31, 2001, placed her right leg in an ELS brace and prescribed medication. At the next visit on January 14, 2002, the doctor prescribed medication and started claimant in physical therapy. At the last visit on February 14, 2002, Dr. Prohaska noted claimant was obviously anorexic and encouraged claimant to maintain proper nutrition. The doctor also noted claimant was released to return to her regular job on February 28, 2002.

On March 8, 2002, Bruce Campbell, ARNP, provided claimant with a prescription slip which noted that although Dr. Prohaska had released claimant to full duty, Mr. Campbell had reservations about claimant's ability to perform her job because of her past injuries and her malnutrition.

On March 9, 2002, claimant fractured her right hip in a fall at a tanning salon. Claimant testified that her right knee gave out and she fell. Conversely, the contemporaneous emergency department nursing assessment contained a history that claimant tripped and fell on a step. The emergency physician record contained a history that claimant tripped while stepping sideways, caught her right foot on a small step and fell. Claimant denies she gave those histories to the emergency room personnel.

Dr. Prohaska noted that at claimant's last visit with him her exam was completely benign but that claimant appeared very anorexic and her nutritional status might make her weak and predispose her to a fall. The doctor opined claimant's fall may have been secondary to weakness from anorexia rather than limitations from her patellar fracture.

Dr. Philip J. Dolan opined claimant's hip fracture was probably related to osteoporosis secondary to anorexia.

On May 30, 2002, Dr. Philip R. Mills examined claimant at her attorney's request and opined claimant was at maximum medical improvement. In his first report, the doctor further opined "there is a causal relationship between the examinee's current complaints and the reported injuries. It should be noted that she had an underlying preexisting malnutrition with osteoporosis."[1] Dr. Mills, offered a corrected report dated June 5, 2002, which concluded claimant was not at maximum medical improvement and changed the causation opinion to "there is a causal relationship between the examinee's current complaints and the reported injuries. The injury to the hip is a natural and probable consequence of the underlying knee injuries."[2]

Initially, respondent and its insurance carrier, Insurance Company of the West, argue the appeal does not raise a jurisdictional issue for an appeal from a preliminary hearing.

An Administrative Law Judge's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the Administrative Law Judge exceeded his or her jurisdiction in granting the preliminary hearing benefits.[3] "A finding

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[1] P.H. Trans., Cl. Ex. 1 at 5.

[2] Ibid.

[3] K.S.A. 44-551(b)(2)(A).

with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."[4] Whether claimant's condition and present need for medical treatment is due to the admitted work-related accident or whether claimant suffered a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

When a primary injury under the Workers Compensation Act arises out of and in the course of the employment every natural consequence that flows from the injury is compensable if it is the direct and natural result of the primary injury.[5] The natural consequence rule applies only to a situation where a claimant's disability gradually increases from a preexisting compensable injury and not when the increase in disability results from a new and separate accident.[6]

The evidence is conflicting whether claimant's fall at the tanning salon was a natural and probable consequence of her knee injuries suffered in the course of her employment with respondent or the result of an intervening non-industrial injury. Claimant testified she never tripped at the tanning salon but instead her knee gave out. The contemporaneous medical records noted a history of a trip and fall.

Drs. Dolan and Prohaska opined claimant's fall was attributable to her weakened physical condition because of her anorexia. The treating physician for claimant's last knee injury, Dr. Prohaska, concluded at his last examination of claimant that her knee condition

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[4] K.S.A. 44-534a(a)(2).

[5] *Gillig v. Cities Service Gas Co.,* 222 Kan. 369, Syl. ¶ 2, 564 P.2d 548 (1977).

[6] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan.260, 505 P.2d 697 (1973).

was benign and he returned her to full duty work. Conversely, Dr. Mills, in his second report, specifically concludes claimant's fall at the tanning salon was a natural and probable consequence of her underlying knee injuries.

The Administrative Law Judge concluded claimant failed to sustain her burden of proof to establish the fall at the tanning salon was a natural and probable consequence of her knee injuries suffered while working for respondent. The Board agrees. The treating physician had released claimant to full duty, the contemporaneous medical records noted claimant had tripped at the tanning salon and Drs. Dolan and Prohaska concluded the fall at the tanning salon was more probably related to claimant's anorexia. Although Dr. Mills second report attributes the fall to claimant's preexisting knee injuries, his first report did not contain those assertions and the reason for clarification of his opinion is not explained. Accordingly, the Board affirms the denial of benefits.

As provided by the act, preliminary findings are not binding but subject to modification on a full hearing on the claim.[7]

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Jon L. Frobish dated June 26, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2002.

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BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and Insurance Co. of the West
James M. McVay, Attorney for Respondent and Continental Western Ins. Co.
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation

[7] K.S.A. 44-534a(a)(2).